STATE OF MICHIGAN

COURT OF APPEALS

Z & R ELECTRIC SERVICE, INC, Plaintiff-Appellant,	UNPUBLISHED June 5, 2001
v	No. 226605 Dickinson Circuit Court
CINCINNATI INSURANCE COMPANY, Defendant-Appellee.	LC No. 99-010685-CK

Before: Sawyer, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Plaintiff Z&R Electric Service, Inc., appeals of right an order granting summary disposition to defendant Cincinnati Insurance Company ("CIC") pursuant to MCR 2.116(C)(10) in this breach of contract action. We affirm, although for different reasons than those stated by the trial court.

I. Basic Facts And Procedural History

In 1993, Z&R contracted with Mead Paper Corporation to build a synchronous condenser system to conserve electricity in its manufacturing facilities. The specific details of the contract between Z&R and Mead are not clear to us because the record does not include a complete copy of this contract. In any event, according to a detailed "formal purchase order," Z&R, in turn, contracted with the Louis Allis Company to design and build the motor that would drive the condenser system. According to photographs, this motor is an extremely large and complex piece of machinery.

Z&R finished installing the condenser system, including the motor, in spring 1995. In April 1995, the system failed when the motor malfunctioned because an internal component separated at a soldered joint. Two months later, the system again failed for the same reason. Fortunately, the physical damage caused in these two incidents was limited to the motor itself and, by making extensive repairs over several months, Z&R was able to prevent this problem from recurring. These repairs cost Z&R between $29,000 and $31,000 in labor. Fred Bieti, Z&R's president, wrote to Z&R's insurance agent asking for assistance in filing a claim with CIC to cover the actual cost of repairing the motor. Subsequently, in a somewhat confusing letter that cited various sections of the insurance policy without explaining how they applied to Z&R's claim for coverage, CIC denied its claim.

After Z&R instituted this action to recover solely for the actual costs it sustained when repairing the motor, CIC moved for summary disposition, presumably under MCR 2.116(C)(10), asserting that the motor's failure was not an "occurrence" the commercial general liability policy covered. CIC also invoked policy exclusion I(A)(1)(k) ("exclusion k"), which precludes coverage for "'property damage' to 'your product' arising out of it or any part of it." In Z&R's response to the motion for summary disposition, it maintained that the motor failures were "occurrences" and that exclusion k did not apply to its claim because the motor was Louis Allis' product under the policy's definition of "your product" as "any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by you." In concluding the response to the motion for summary disposition, Z&R asked the trial court to deny CIC's motion and, instead, to enter summary disposition in its favor. The trial court ruled that the motor failure was an "occurrence," but that CIC was not liable under exclusion k because the damage arose from Z&R's "product."

On appeal, Z&R contends that the insurance policy is, at best ambiguous with respect to whether exclusion k applies rather than the exclusion in section I(A)(1)(l) ("exclusion l"), which applies to "your work." Z&R relies on this argument because exclusion l includes an exception for a subcontractor's work. Z&R does not raise a specific argument concerning whether the motor malfunction was an "occurrence" under the policy, probably because the trial court ruled in its favor on this issue and it simply asserts that the malfunction was an "occurrence." However, when disputed as in this case, the first logical question that a court must resolved in any case involving an insurance claim is whether a triggering event identified in the policy happened. Because we determine that there was no "occurrence" under the policy, we need not reach Z&R's arguments concerning the exclusions and exceptions that might otherwise apply.

II. Standard Of Review

We review de novo a trial court's order granting or denying motions for summary disposition.[1]

III. Legal Standards

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests a claim's factual basis other than an amount of damages, which requires the deciding court to consider all the evidence, affidavits, pleadings, admissions, and other information available in the record.[2] The deciding court must look at all the evidence in the light most favorable to the nonmoving party, which must be given the benefit of every reasonable doubt.[3] Black letter law provides that if an insurance contract is unambiguous "and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant

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[1] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[2] MCR 2.116(G)(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

[3] *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998).

summary disposition to the proper party pursuant to MCR 2.116(C)(10)."[4] However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute, making trial necessary.[5] In other words, a plaintiff must show that there is a genuine issue of material fact regarding each element of the prima facie case to survive a motion for summary disposition under MCR 2.116(C)(10).[6]

In order to carry out our analysis of the evidence on the record, we keep in mind the well-known rules of interpretation that apply to insurance contracts:

> First, an insurance contract must be enforced in accordance with its terms. A court must not hold an insurance company liable for a risk that it did not assume. Second, a court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. Thus, the terms of a contract must be enforced as written where there is no ambiguity.
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> While we construe the contract in favor of the insured if an ambiguity is found, this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefitting an insured. The fact that a policy does not define a relevant term does not render the policy ambiguous. Rather, reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings. Indeed, we do not ascribe ambiguity to words simply because dictionary publishers are obliged to define words differently to avoid possible plagiarism.[7]

IV. Occurrence

CIC's commercial general liability coverage form states that it will pay for property damage that results from an "occurrence," defining an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy does not define what the word "accident" means, but the common meaning ascribed to the word in the *Random House Webster's College Dictionary* (2d ed) is "an undesirable or unfortunate happening that occurs unintentionally and usu[ally] results in injury, damage, or loss." The Michigan Supreme Court adopted a substantially similar definition of "accident" in the insurance context almost thirty years ago:

> "An 'accident,' within the meaning of policies of accident insurance, may be anything that begins to be, that happens, or that is a result which is not

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[4] *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

[5] MCR 2.116(G)(4); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

[6] See *Richardson v Michigan Humane Society*, 221 Mich App 526, 527-528; 561 NW2d 873 (1997).

[7] *Henderson*, *supra* at 354-355 (citations omitted).

> anticipated and is unforeseen and unexpected by the person injured or affected thereby – that is, takes place without the insured's foresight or expectation and without design or intentional causation on his part. In other words, an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected."[8]

Further, whether an accident occurred must be viewed from the insured's perspective.[9]

With these definitions and proper perspective in mind, there really is no debate in the record that Z&R did not expect the motor it purchased from Louis Allis to malfunction soon after installing it, constituting the sort of unforeseen event resulting in damage that fits the ordinary definition of an "accident." However, CIC contends, this malfunction was not an "accident" because it was the natural result of Z&R's own defective product. As authority for this proposition, CIC cites the reasoning in a number of cases, including *Calvert Ins Co v Herbert Roofing & Insulation Co*,[10] which this Court recently adopted in *Radenbaugh v Farm Bureau General Ins Co of Michigan*,[11] and *Hawkeye-Security Ins Co v Vector Const Co*,[12] distinguishing this case from *Bundy Tubing Co v Royal Indemnity Co*.[13] The *Radenbaugh* Court gave a lengthy synthesis of *Calvert*, *Vector*, and *Bundy*, making it unnecessary for us to repeat that effort here.[14]

In short, *Calvert* holds that "when the damage arising out of the insured's defective workmanship is confined to the insured's own work product, the insured is the injured party, and the damage cannot be viewed as accidental within the meaning of the standard liability policy."[15] We agree with Z&R's argument that Louis Allis was its subcontractor and that Louis Allis, not Z&R, defectively designed and manufactured the motor. Yet, we note the parallels between the facts of this case and the facts of *Vector*, on which *Calvert* relied.

In *Vector*, the insured purchased cement from a third-party, which it then used to construct a water treatment plant.[16] The municipality that owned the plant discovered that the concrete was defective.[17] To remedy the problem, the insured had to remove 13,000 yards of the

[8] *Guerdon Industries, Inc v Fidelity & Casualty Co*, 371 Mich 12, 18-19; 123 NW2d 143 (1963), quoting Couch on Insurance, 2d ed, § 41:6, p 27.

[9] *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114; 595 NW2d 832 (1999).

[10] *Calvert Ins Co v Herbert Roofing & Insulation Co*, 807 F Supp 435 (ED Mich, 1992).

[11] *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134, 148; 610 NW2d 272 (2000).

[12] *Hawkeye-Security Ins Co v Vector Const Co*, 185 Mich App 369; 460 NW2d 329 (1990).

[13] *Bundy Tubing Co v Royal Indemnity Co*, 298 F2d 151 (CA 6, 1962).

[14] *Radenbaugh*, *supra* at 144-148.

[15] *Calvert*, *supra* at 439.

[16] *Vector*, *supra* at 371.

[17] *Id*.

defective concrete and replace it with concrete that met the project's standards.[18] When the insured submitted a claim for the costs it incurred in undertaking this extensive repair effort, the insurer denied its claim on the basis that there had been no "occurrence" under the insurance policy.[19] The policy defined an "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured . . . ."[20] The trial court granted the insurer's motion for summary disposition.[21] On appeal, this Court interpreted *Bundy*, *supra*, to mean that "an insurer must defend and may become obligated to indemnify an insured under a general liability policy of insurance that covers losses caused by 'accidents' where the insured's faulty work product *damages the property of others*."[22] Consequently, this Court held that there had been no occurrence within the meaning of the policy because the defective concrete damaged nothing but the insured's work product.[23]

The insured in *Vector* was no more responsible for making the defective concrete than Z&R was responsible here for the defective design and manufacture of the motor. In each case, a third party caused the problem in the materials the insured used, which ultimately failed. However, critically, unlike the damage to other individuals' property at issue in *Bundy*,[24] *Calvert*,[25] and *Radenbaugh*,[26] the record here does not include evidence that the motor's failure damaged any other part or aspect of the Mead facility. The malfunction merely made the system inoperative in the same way that the defective concrete made the water treatment plant in *Vector* unusable, with the defects in both cases requiring massive repair and replacement efforts.

Though the trial court erroneously concluded that there had been an "occurrence" under the policy, summary disposition under MCR 2.116(C)(10) was proper because there is no dispute in the record that the damages at issue in this case were confined to the condenser system Z&R designed and installed, of which the motor was an integral part. The magnitude of the repairs in this case makes the impulse to seek insurance coverage understandable. Nevertheless, to paraphrase *Calvert*, this insurance policy protects Z&R from bearing the cost of liability for tortious damage it causes to others or their property, not the costs it might sustain in remedying a

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[18] *Id*. at 371-372.

[19] *Id*. at 372.

[20] *Id*. at 373.

[21] *Id*. at 372.

[22] *Vector*, *supra* at 377 (emphasis added).

[23] *Id*. at 378.

[24] *Bundy*, *supra* at 151-152, 154 (insured manufactured defective tubing used for radiant heating, which evidently damaged buildings and their contents when the tubing leaked).

[25] *Calvert*, *supra* at 436, 438-439 (insured installed roof on school that leaked, damaging contents of building, as well as walls and the foundation).

[26] *Radenbaugh*, *supra* at 136, 142, 144 (insured provided faulty schematics to contractors who constructed homeowner's foundation, causing damage to the foundation and the home itself).

breach of its contract to construct an operational condenser system for Mead.[27] Thus, we have no reason to reverse.[28]

Affirmed.

/s/ David H. Sawyer
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

[27] *Calvert*, *supra* at 438, n 1.

[28] *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).